

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 7872—Special Calendar

**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1941

JAMES CURTIS, APPELLANT

v.

THOMAS M. RIVES, SUPERINTENDENT OF THE WASHINGTON
ASYLUM AND JAIL, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF AND APPENDIX ON BEHALF OF APPELLEE

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v.

THOMAS M. RIVES, SUPERINTENDENT OF THE WASHINGTON
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF THE APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the District Court of the United States for the District of Columbia, discharging a writ of *habeas corpus* and dismissing the petition upon which the writ was issued, and remanding the appellant, petitioner below, to the custody of Thomas M. Rives, appellee.

Jurisdiction of the District Court in *habeas corpus* proceedings is established under the D. C. Code (1929), tit. 24, § 201; *id.*, tit. 18, § 57; 28 U. S. C. §§ 451, *et seq.*; Rev. Stat., § 751.

This Court acquires jurisdiction to review a final order in a *habeas corpus* proceeding by virtue of the D. C. Code (1929), tit. 18, § 26; and 28 U. S. C., § 463b, 43 Stat. 490, 48 Stat. 926.

On August 12, 1940, appellant filed in the District Court, without prepayment of costs, a petition for writ of *habeas corpus*, alleging illegal restraint of his liberty within the District of Columbia by the appellee, the Superintendent of the

Washington Asylum and Jail. The appellee made return to the petition, and answer to the writ of *habeas corpus*, on August 16, 1940. On August 19th appellant filed an amendment to the return and answer. The cause came on for hearing and on January 6, 1941, the District Court entered its order discharging the writ and dismissing the petition. The present appeal was taken from that order.

STATEMENT OF THE CASE

The pertinent facts are contained in a memorandum opinion filed by the District Court at the conclusion of the hearing on the petition and return thereto, which opinion is reported in 36 F. Supp. 408. Briefly stated, the relevant facts are as follows:

Appellant was indicted in the District of Columbia on March 18, 1937, for the crime of robbery. He was convicted after a trial by jury on March 22, 1938 (Tr. 1). Upon motion of the appellant, he was granted a new trial, and on January 18, 1939, was again found guilty as indicted. A motion for a new trial was denied by the trial court on January 27, 1939. Appellant, in proper person, asked leave to file a further motion for a new trial which was denied on April 19, 1939. Thereupon appellant was sentenced to imprisonment in the penitentiary for a term of from two years and two months to five years, which sentence he is now serving. On May 19, 1940, appellant filed in the District Court a document entitled "Specification of Errors on Appeal," together with a document entitled "Notice of Appeal in Forma Pauperis" (Tr. 9). These documents were filed in this Court as No. 7418, "*James Curtis, Appellant, v. United States of America.*" That appeal was dismissed on June 19, 1939, upon motion of the Government, because of failure of the appellant to file a notice of appeal within the time required (Tr. 10).

On August 12, 1940, appellant filed in the District Court the petition for writ of *habeas corpus*, herein involved, in which he alleged illegal restraint of his liberty by the appellee on the grounds that (1) he was not confronted at the criminal trial with the witnesses against him, in that certain persons,

namely, Nathan Reiskin, proprietor of the store robbed; Vincent Curley, a clerk in that store who was robbed of a billfold containing \$2.00; Blanche Greene and George F. Green, customers at the time—all of whom were known and available to the police and who were personally present at the time of the alleged robbery—were not called to testify; and (2) he was denied the right to have compulsory process for obtaining witnesses on his behalf (Tr. 1). The return and answer to the petition, filed by the appellee on August 16, 1940, set forth the facts substantially as related above, and denied that the police withheld certain witnesses from testifying at the criminal trial; that the police incidental bearing the names of the several witnesses referred to in the petition for writ of habeas corpus was not only known to the attorney for appellant at the time of his trial but that the original incidental itself was in the possession of that attorney; and that appellant was not denied the right to compulsory process but, on the contrary, all the persons for whom subpoenas were issued were interviewed personally by appellant's counsel prior to the criminal trial (Tr. 9). On August 19, 1940, appellee filed an amendment to his return and answer (Tr. 12), alleging that the several persons who were present at the time of the robbery, but who were not called on behalf of the Government, would not have been able to have testified whether Curtis was or was not the person who robbed the store on the night in question. At the hearing on the petition and amended return and answer thereto, held on November 29, 1940, there was introduced in evidence the transcript of the proceedings at the trial in Criminal Case No. 59,347, wherein appellant was convicted, which transcript was made a part of the original record filed in this Court. As is apparent from those portions of that transcript which are set out in the appendix to this brief, appellant was positively and unequivocally identified at the criminal trial by two eye-witness victims, namely, James Bowyer and Jesse G. Abrams, as one of the two men who perpetrated the robbery in question. (Appellee's App. 43, 50.) Moreover, it is clear therefrom that counsel for the appellant had available to him during the criminal trial the police incidental which contained

the names and addresses of the witnesses whom appellant now contends should have been called by the Government (Appellee's App. 53).

Called as witnesses at the hearing on the petition in the present case were the two identifying witnesses at the criminal trial and the other persons named in the police incidental as having been present at the time of the robbery. Bowyer and Abrams again identified Curtis, with absolute certainty, as the man who robbed them (Appellee's App. 34, 41).

Abrams further testified that Nathan Reiskin, the proprietor of the store robbed, and one of the persons absent at the criminal trial, was not present at the time of the crime or immediately thereafter (Appellee's App. 34).

George Frederick Green testified that he was present in the drug store when it was robbed but did not see the men who committed the robbery; that he was made to get into a corner when the robbers came in; that he "couldn't get a good look at them"; and that although he was aware that one of the two men was tall, he would not know either of them if he saw them again (Appellee's App. 29).

Blanche P. Greene, the other customer present during the robbery, stated that she came into the store while the robbery was in progress; that a short man put a gun in her side and told her to go to the back of the store; that she did not see the other man, who—according to Abrams and Bowyer—was the appellant; and that she could not recognize either of the persons who committed the crime (Appellee's App. 32).

The testimony of Vincent J. Curley (Appellee's App. 23) was to the effect that he was a clerk in the drug store at the time of the robbery; that he had opportunity to observe both men who committed the crime; that one was tall and one was short; that upon being shown several photographs shortly after the robbery he did not identify that of Curtis, the appellant, as one of the men who robbed him, although someone else did; that at a line-up in Baltimore, Maryland, he recognized Curtis by the picture that had been shown to him but that he did not "believe" that he was the man involved, although he could not say definitely that he was not. He further testified in response to the question asked him by ap-

pellant's counsel: "You knew then that he was not the man, didn't you?": "I don't remember whether I definitely stated he was not, but I don't believe he was." (Appellee's App. 25.) Curley further stated that the statement which he was making at the *habeas corpus* hearing was substantially the same as that contained in a written statement he had made on July 9, 1940 (Appellee's App. 27). The latter statement, with respect to Curtis, was as follows:

Several weeks later I visited the Baltimore jail, at which time I viewed a line-up of four or five men. At that time a man, later identified to me as James Curtis, was in the line-up. At that time when I viewed the line-up I felt as though the man I later learned was James Curtis, who was in the line-up, was not the taller of the two men who engaged in the hold-up at 87 Florida Avenue, referred to above. I cannot say positively whether he was or was not the taller of the two men. Deep down in my heart I do not believe that it was the man, and I did not believe it at the time, but I had to allow myself a certain leeway for my own weaknesses, as far as remembering is concerned, in my excitement, and, therefore, I did not want to be positive either way. I feel now that if I saw the taller of the two men that engaged in the robbery that I would recognize him; but until such a time as I would see that man and positively put myself at ease that he was the hold-up man I would not say positively that the one known to me as James Curtis was not the man (Appellee's App. 27).

With respect to the question of whether appellant was denied the right to have compulsory process in his favor, the evidence shows as follows: The attorney who defended appellant at the criminal trial testified that "those witnesses who had been subpoenaed from Baltimore at my request were here. I talked to them and they told me that their testimony would be very unfavorable to Curtis, and then, acting on what I thought was best for my client, I told them to go back to Baltimore because I was afraid, maybe, if they stayed here the Government would use them and they would be

unfavorable to the defendant. They thereafter left. When they left it was at my request because I thought I was acting in the best interests of the defendant" (Appellee's App. 37). Appellant did not call any of these witnesses at the hearing in the present proceedings. No evidence was adduced to establish that their testimony, if available, would have been material or pertinent to appellant's defense.

From the pleadings and evidence, the substance of which is related above, the lower court found that the defendant had not been deprived of any constitutional right and that the Government was not guilty of concealing evidence favorable to the appellant. It, accordingly, discharged the writ and dismissed the petition upon which it was issued (Tr. 140). This appeal thereupon was taken from that order (Tr. 141).

ISSUES INVOLVED

It is respectfully submitted that the issues involved on this appeal are as follows:

1. Whether appellant was denied the constitutional right to be confronted with the witnesses against him.
2. Whether appellant was denied the constitutional right to have compulsory process for obtaining witnesses in his favor.
3. Whether appellant may now urge, as a ground for release, the contention that he was denied the right to assistance of counsel in perfecting an appeal from the judgment of conviction entered in the criminal proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUMMARY OF ARGUMENT

I. The appellant's contention that he was denied the right to be confronted with the witnesses against him is not sustained by the evidence. The purpose and function of the right of confrontation are to secure to the accused the opportunity to meet the witnesses against him face to face and to cross-examine them. This opportunity was afforded the appellant to the fullest extent.

The constitutional right of confrontation does not require the Government to place upon the witness stand every witness that may be known to it, however slight his knowledge of the facts might be. The failure to call witnesses whose testimony would be either vague and inconclusive or merely corroborative does not constitute suppression of evidence. *Jordon v. Bondy*, 72 App. D. C. 360, 365, 114 F. (2d) 599, 604. The testimony of the eye-witnesses to the robbery who were not called in the present case would have been vague and indefinite with respect to the question of the identity of the person committing the robbery, of which the appellant was convicted. Moreover, appellant was fully apprised of the identity and whereabouts of all the witnesses to the robbery. He had the right, which he did not exercise, of calling those witnesses in his own behalf. Consequently, it cannot now be urged that the Government concealed or suppressed their testimony.

II. The contention that the appellant was denied the right to have compulsory process for obtaining witnesses in his favor is likewise without merit. The uncontradicted testimony is to the effect that the witnesses desired by the appellant for his defense were subpoenaed and were in court at the time of the trial, but were excused by appellant's counsel because their testimony would have been unfavorable to the appellant. Having exercised the right to subpoena witnesses at the expense of the Government, appellant cannot now complain that he was denied that right. Moreover, an application for subpoenaing of witnesses is addressed to the sound discretion of the trial court, and the denial of such an application cannot be challenged even on direct review. Consequently, the alleged denial of the right presents no ground for

release, in any event. See *Goldsby v. United States*, 160 U. S. 70, 60 S. Ct. 216, 40 L. ed. 343.

III. The contention that appellant was denied the right to assistance of counsel in perfecting an appeal from the judgment of conviction was not raised in the court below, and therefore cannot be considered by this Court on appeal.

ARGUMENT I

Appellant was not denied his constitutional right to be confronted with the witnesses against him

The principal contention urged by the appellant on this appeal is that he was denied the right granted him by the Constitution to be confronted with the witnesses against him. Specifically, it is urged that he is entitled to release because Nathan Reiskin, the proprietor of the store robbed, Vincent Curley, a clerk employed by Reiskin, and Blanche Greene and George F. Green, customers in the store at the time of the robbery, were not called by the Government at the criminal trial. But, as is clearly apparent from the record in this proceeding, as well as from the record in the criminal trial, the testimony of these persons would have been vague and inconclusive, particularly with respect to matters otherwise fully proven. Consequently, the failure to call them constituted neither suppression of evidence nor a violation of the Sixth Amendment.

Although the Sixth Amendment to the Constitution guarantees to an accused the right to be confronted with the witnesses against him, the purpose and function of that right are to secure to the accused the opportunity of cross-examination and of observing the demeanor and conduct of those who testify against him. *Snyder v. Massachusetts*, 291 U. S. 97, 107; *Mattox v. United States*, 156 U. S. 237, 242, 15 S. Ct. 337, 49 L. ed. 409; 5 WIGMORE, EVIDENCE (3d ed., 1940), § 1395. The substance of the guaranty is "to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." *Dow-*

dell v. United States, 221 U. S. 325, 329-330, 31 S. Ct. 590, 55 L. ed. 753. The right was a common law right having recognized exceptions. *Salinger v. United States*, 272 U. S. 542, 548, 47 S. Ct. 173, 71 L. ed. 398. The protection of the right does not require the Government to place upon the witness stand any or every person who may have some knowledge of the crime which is the subject of the trial. In this respect it is well settled that the Government may prosecute a case in such manner as it may consider expedient and wise. It is under no obligation to call any particular witnesses or produce all evidence which it may have in its possession. As was said in *Williams v. United States*, 57 App. D. C. 253, 20 F. (2d) 269:

In the ordinary criminal trial, the district attorney is entitled to pursue and elaborate his theory of the case, and to exercise his own judgment as to the witnesses to be called. In determining what testimony shall be adduced, his judgment is not to be challenged or interfered with, so long as the rules of evidence and procedure are complied with, and there is nothing in either which required the district attorney in the present case to call a particular witness to testify merely because his name was indorsed upon the indictment.

This principle was restated and reaffirmed recently by this Court in the case of *Jordon v. Bondy*, 72 App. D. C. 360, 365, 114 F. (2d) 599, 604. See, also, *Sanford v. United States*, 69 App. D. C. 46, 98 F. (2d) 325; *Love v. United States*, 74 F. (2d) 988 (C. C. A. 9); *Aycock v. United States*, 62 F. (2d) 612 (C. C. A. 9).

There is no contention that the appellant or his counsel were absent at the criminal trial when the witnesses for the Government were called to testify. That they were confronted by those witnesses is not disputed. It follows, therefore, that the appellant was afforded an opportunity to cross-examine the witnesses—which opportunity was availed of to the fullest extent—and of observing their demeanor and conduct on the witness stand. Hence the right of confrontation was not violated. As Mr. Justice Rutledge said in the *Jordon Case*, *supra*, "The Constitution literally requires only that the accused 'be

confronted with the witnesses against him,' and that mandate was complied with literally at the trial."

Moreover, even if the Sixth Amendment—or due process of law under the Fifth Amendment—enjoins the Government from concealing witnesses whose presence may be favorable to the defendant in a criminal case, there was no suppression or concealment in the present case which would require appellant's release on *habeas corpus*. It may be conceded, for purposes of this appeal, that a duty rests upon the prosecutor to inform the defense of any witness favorable to the defendant. Compare *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791. But under no circumstances is there a duty to bring forth witnesses whose testimony would be merely cumulative, corroborative, vague, or uncertain, particularly where such witnesses are known and available to the defense. The applicable rule in this respect was well stated by this Court in the *Jordon Case*, *supra*, as follows:

But if the spirit [of the Sixth Amendment] requires the letter to be construed more broadly, so as to require the prosecutor to disclose, in order not to conceal, evidence which comes to his knowledge prior to the trial and vitally affects the question of guilt or innocence, whether to the court or to the accused or his counsel, there is no violation of either letter or spirit when he merely fails to disclose evidence of which he has no knowledge or fails simply to use or disclose evidence which is only vague, inconclusive, and cumulative, as was that in question here. It has been held repeatedly that the prosecution is under no obligation to call all witnesses subpoenaed by the Government, and we now hold that it is no sufficient ground for release by *habeas corpus* from punishment lawfully imposed that the prosecution either does not discover or does not use as witnesses or disclose the names of persons whose testimony can be only cumulatively corroborative of facts fully proven by other witnesses or evidence.

In *Cummings v. United States*, 15 F. (2d) 168 (C. C. A. 9), the court, in passing upon the propriety of an instruction, stated:

We know of no rule of law "that it is incumbent upon a party to a lawsuit to produce all witnesses cognizant with the facts." Such a rule would impose upon a party the burden and expense of producing cumulative testimony, and of every witness, however slight his knowledge of the facts might be.

An examination of the record in this case shows that the four persons who were not called by the Government could not have testified to any fact material to the case, and that their testimony would have been vague and inconclusive with respect to facts fully proven by other witnesses.

Thus, Nathan Reiskin, the proprietor of the store, one of the victims of the robbery, would have been unable to testify to any fact pertaining to the robbery, for he was not present at the time. That he was the victim of the crime is in itself immaterial. *Aycock v. United States*, 62 F. (2d) 612 (C. C. A. 9). See *Love v. United States*, 74 F. (2d) 988 (C. C. A. 9).

Vincent Curley, the clerk in the store and also a victim of the crime, when questioned, could not state with certainty that the appellant was or was not the person who committed the robbery. His testimony at the hearing on the petition for *habeas corpus* was merely that he had an opportunity to observe the two men who committed the crime; that one was tall and the other was short; that he was unable to identify a photograph of appellant shown to him shortly after the robbery; that at a line-up in Baltimore, Maryland, he recognized the appellant by the picture that had been shown to him but that he did not "believe" that he was the man involved although he could not say definitely that he was not (Appellee's App. 23-26). With respect to the identification of appellant in Baltimore, Curley testified that a statement which he had made to the police on July 9, 1940, was correct. That statement was in part as follows:

At that time when I viewed the line-up I felt as though the man I later learned was James Curtis, who was in the line-up, was not the taller of the two men who engaged in the hold-up at 87 Florida Avenue, referred to above. I cannot say positively whether he was or was not the

taller of the two men. Deep down in my heart I do not believe that it was the man, and I did not believe it at the time, but I had to allow myself a certain leeway for my own weaknesses, as far as remembering is concerned, in my excitement, and therefore I did not want to be positive either way. I feel now that if I saw the taller of the two men that engaged in the robbery that I would recognize him; but until such a time as I would see that man and positively put myself at ease that he was the hold-up man I would not say positively that the one known to me as James Curtis was not the man (Appellee's App. 27).

Curley's testimony, therefore, was too vague to be of value either to the Government or to the appellant. The prosecutor is under no obligation to produce as a witness every person who visits a police station to look at the defendant for purposes of possible identification. *State v. DeCesare*, 12 A. (2d) 727 (R. I.).

Blanche P. Greene, one of the customers present in the store during the robbery, could have testified only that she came into the store while the robbery was in progress; that she saw but one of the robbers—a short man; and that she could not recognize either of the robbers if she saw them (Appellee's App. 32).

George Frederick Green, the other customer in the store at the time, did not see the robbers; and although he was aware that one of them was tall, he "couldn't get a good look at them" and, consequently, would not know either of them if he saw them again (Appellee's App. 29).

On the other hand, Jesse G. Abrams, the pharmacist in charge of the drug store, and James Bowyer, another customer, were positive in their identification of the appellant as one of the robbers, not only at the criminal trial, but also at the hearing in the court below. Thus, Abrams testified at the criminal trial (Appellee's App. 47) as follows:

Q. Did Mr. Curtis have any mask or anything on his face when he came in?

A. There was no cover on his face at all.

Q. Were you able to get a good look at him during the time?

A. I got a very good look at him.

Q. Approximately how long was he in there, would you say?

A. He was in the store for about four or five minutes.

Q. Are you positive that Mr. Curtis here is the man that held you up and did the things you said?

A. I am positive that he is the man.

And at the hearing in the court below (Appellee's App. 35) he reiterated this testimony as follows:

Q. Did there come a time when you identified a man who had participated as one of the hold-up men in that case?

A. Yes.

Q. And whom did you identify?

A. I identified that man right there [indicating].

Q. Who is that man?

A. Mr. Curtis.

Q. Do you identify him today as being one of the two men?

A. I do.

Q. Are you absolutely positive that he was the man?

A. I am.

Q. And you have so testified a number of times; is that correct?

A. I did.

Q. Have you always been absolutely positive that he was one of the men?

A. Yes; I have.

James Bowyer testified at the criminal trial (Appellee's App. 52) as follows:

Q. Did you get a good look at the defendant, James Curtis?

A. I did.

Q. How long were you able to get a look at him?

A. About three or four minutes.

Q. Was the light good or bad?

A. It was well lighted, the store was well lighted.

Q. Are you absolutely positive that this defendant is the man whom you referred to in your statement as James Curtis?

A. I am, positively.

And his testimony in the court below on the petition for *habeas corpus* was identical (Appellee's App. 41).

The evidence set forth above shows conclusively that the testimony of the eye witnesses to the robbery who were not called would have shed no light upon the question of the guilt or innocence of the appellant. Their testimony would have been, at best, vague and indefinite, and in no way contradictory of the testimony of the witnesses called by the Government. The latter established beyond a reasonable doubt that the appellant was the man who committed the robbery in question. The trial court, therefore, properly found that there was no concealment or suppression of evidence at the appellant's criminal trial, and its action in this respect should be sustained. *Jordon v. Bondy*, 72 App. D. C. 360, 114 F. (2d) 599, 604. As was said by the Supreme Court of Illinois in *People v. Karatz*, 365 Ill. 255, 5 N. E. (2d) 842, the mere fact that the prosecutor did not call certain witnesses does not require the conclusion, urged by the appellant, that he is guilty of suppressing evidence. See *Ware v. People*, 76 Colo. 38, 230 P. 123, 124.

Moreover, appellant's contention that the Government suppressed evidence is further refuted by the fact that the contents of the police incidental, which included the names and addresses of all witnesses present in the store at the time of the robbery, including those who were not called by the Government, was known to the appellant or his counsel. In fact, the incidental was subpoenaed by the appellant at the trial, and was produced by the Police Department in court. The attorney who represented appellant in the criminal trial testified in the court below, at the hearing on the petition, that he knew of the availability of the persons named; that he talked them over with the appellant; and that, if he did not summons them as witnesses, it was because he did not think their testimony

would be helpful to the appellant (Appellee's App. 40). He testified further that, in his argument to the jury, the absence of these witnesses was commented upon adversely (Appellee's App. 40, 55). Under these circumstances, it would be paradoxical to release the appellant because the Government did not call these persons to the witness stand. Certainly, the Government cannot be criticized or censured for failure to call persons whose identity and whereabouts are fully known to the defendant, even when the testimony of such persons would be favorable to him. In such a case, the law provides a defendant, through the power of subpoena, adequate machinery for enforcing their appearance at the trial. This was not availed of by the appellant. But in any event, the witnesses not called in the present case were not material, and their absence was not prejudicial to the defense.

II

Appellant was not denied the constitutional right to have compulsory process for obtaining witnesses in his favor

It is further contended by the appellant that his constitutional right to have compulsory process for obtaining witnesses in his favor, guaranteed to him by the Sixth Amendment, was violated; hence his conviction and sentence are void and he is entitled to release. The contention, however, lacks merit, both in fact and in law.

The record of the proceedings in the court below clearly establishes, contrary to the charge made by appellant, that he was afforded every assistance in obtaining witnesses in his behalf. Testimony of the appellant's attorney at the criminal trial shows as follows:

Mr. Curtis told me that there would be certain witnesses in Baltimore who could prove that he was somewhere else on the night in question.

I think there were four or five in number. One I think was Dr. O'Brien, and there was a Miss Archer. I think there were one or two others—also a taxi driver.

I prepared a summons in accordance with the D. C. Code whereby the defendant has that right, to certify

to the Court under oath that for lack of funds and to bring these witnesses here at its own expense.

That affidavit was filed. Mr. Jackson interposed no objection. Judge Laws signed the order, and the witnesses were summoned, and we had planned for a trial in September. We set a date (Appellee's App. 36).

These witnesses, who were subpoenaed from Baltimore at the expense of the Government, were present in court when the case came on for trial; but, upon being interviewed by appellant's attorney, were not called to testify. In this respect the record in the present case is illuminating. Thus, the appellant's attorney testified:

I talked to them and they told me that their testimony would be very unfavorable to Curtis, and then, acting on what I thought was best for my client, I told them to go back to Baltimore because I was afraid, maybe, if they stayed here the Government would use them and they would be unfavorable to the defendant.

They thereafter left. When they left it was at my request because I thought I was acting in the best interests of the defendant (Appellee's App. 37).

This testimony is uncontradicted, and is sufficient to dispose of appellant's contention. Certainly, the fact that witnesses, after having been duly subpoenaed, are not used at the trial by the defense, cannot operate as a denial of the right to have compulsory process. On the contrary, the mere fact that such witnesses were present in the courtroom is conclusive that the right had been granted and exercised. Why the witnesses summoned on behalf of the appellant were not produced on the witness stand is a question which is not material to the present inquiry, and requires no discussion. The appellant, having failed to sustain the burden of establishing that a constitutional right was invaded, was properly denied release. *Zahn v. Hudspeth*, 102 F. (2d) 759 (C. C. A. 10).

Furthermore, even assuming that a showing had been made that compulsory process at the expense of the Government had been denied the appellant in the present case, that alone affords no ground for release on *habeas corpus*. In the District of Columbia, the procedure for obtaining witnesses in criminal trials without payment of costs is provided by Section 368 of Title 6, D. C. Code (1929), the text of which is set out in the margin.¹ This section is substantially the same as Section 878, REV. STAT., 28 U. S. C. 656, applicable to federal district courts generally. In construing and applying the latter statute, the Supreme Court of the United States has held that an application for subpoenaing of witnesses on behalf of the defense at the expense of the United States is addressed to the sound discretion of the trial court, and the denial of such an application cannot be challenged, even on direct appeal.

Goldsby v. United States, 160 U. S. 70, 60 S. Ct. 216, 40 L. ed. 343;

Crumpton v. United States, 138 U. S. 361, 365, 11 S. Ct. 355, 34 L. ed. 958.

See: *Austin v. United States*, 19 F. (2d) 127 (C. C. A. 9), *cert. denied*, 275 U. S. 523;

Gibson v. United States, 53 F. (2d) 721 (C. C. A. 8), *cert. denied*, 285 U. S. 557.

The rule is well stated by the Supreme Court in the *Goldsby* Case as follows:

There was likewise no error in the action of the court in relation to the various requests to summon witnesses at government expense; on the contrary, the fullest latitude was allowed the accused. Were it otherwise,

¹ The statute provides: "In any criminal trial the justice trying the case may allow such number of witnesses on behalf of the defendant as may appear to be necessary, the fees of such witnesses to be paid in the same manner as the fees of the witnesses for the Government: *Provided*, That the defendant makes application under oath before the trial, or, in cases of manifest necessity, during the trial, setting forth that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, and setting forth also the names of such witnesses and what he expects to prove by them, in order that the court may be advised whether or not the testimony be material to the issue."

the right to summon witnesses at the expense of the government is by the statute (Rev. Stat. § 858) left to the discretion of the trial court, and the exercise of such discretion is not reviewable here.

Moreover, it is significant that, although it is urged by the appellant that the witnesses who did not testify would have established an impregnable alibi, not a single one of those witnesses was present at the hearing on the petition to support this assertion. As the record in this case will show, the hearing was continued several times over a period of approximately three months at the request of the appellant (Tr. 134), during all of which time the processes of the District Court were available to the appellant to summon these witnesses, at Government expense. As was said by the trial court in its opinion, 36 F. Supp. 408: "Not one of these witnesses appeared at the hearing in these proceedings; nor was any evidence, other than certain statements of the petitioner, produced which would show that, if they had been present and testified in the trial of the petitioner, his presence elsewhere than at the place of the commission of the crime would have been established by them."

It is suggested by the appellant, in his brief, that the reason why the witnesses summoned on his behalf were not produced on the witness stand was the inexperience or negligence of the attorney who then represented him. But the right to have compulsory process must not be confused with the right to be represented by competent counsel. That the former right was granted the appellant is readily apparent from those portions of the record set forth above. No contention was advanced in the pleadings or at the hearing in the court below that the appellant's conviction was void because he lacked competent counsel at the criminal trial. Consequently, that question is not open for consideration on appeal. *Crockett v. Johnston*, 109 F. (2d) 444 (C. C. A. 9), *cert. denied*, 310 U. S. 626; *Dea Hong v. Nagle*, 300 Fed. 727 (C. C. A. 9). Nor could such a contention be sustained, if it had been made. An examination of the record in the court below and the transcript of the evidence of the criminal trial is sufficient to

establish its utter futility. There is nothing contained therein upon which a charge of incompetence or negligence can be predicated. In this respect it should be noted that the attorney who represented the appellant was of his own selection (Tr. 119).

Thus, even if the appellant's contention that he was denied his day in court because he was represented by incompetent or negligent counsel had been properly raised by the pleadings in the court below, he has not, in fact, sustained the burden of proving that contention. See *Bostic v. Rives*, 71 App. D. C. 2, 107 F. (2d) 649, 652; *Zahn v. Hudspeth*, 102 F. (2d) 759, 762 (C. C. A. 10). On collateral attack a judgment of conviction carries with it a presumption of regularity and may not be lightly set aside. *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed. 1461. The burden is upon the petitioner to convince the court by a preponderance of the evidence that he has been denied his constitutional right to have the assistance of counsel for his defense. Appellant has fallen far short of this accomplishment.

III

The question of whether the appellant was denied the right to assistance of counsel in perfecting an appeal from the judgment of conviction is not properly before this Court

It is urged on this appeal for the first time that the appellant was denied his right to assistance of counsel because he was not aided in that respect in perfecting an appeal from the judgment of conviction. But this contention, like the contention last made with regard to the incompetence and negligence of his attorney in excusing witnesses duly subpoenaed on his behalf, was not alleged as a ground for release in the petition for *habeas corpus*. It is advanced for the first time on appeal in this Court. Consequently, the question is not properly before the Court. *Crockett v. Johnston*, 109 F. (2d) 444 (C. C. A. 9), *cert. denied*, 310 U. S. 626; *Dea Hong v. Nagle*, 300 Fed. 727 (C. C. A. 9).

CONCLUSION

It is respectfully submitted that under no circumstances can it be held that the lower court erred in dismissing appellant's petition for judicial relief. The evidence as well as the allegations of the petition itself fail to sustain the contentions advanced on appeal. The order of the court below, being proper, should therefore be affirmed.

EDWARD M. CURRAN,

United States Attorney,

CHARLES B. MURRAY,

Assistant United States Attorney,

BERNARD MARGOLIUS,

Assistant United States Attorney,

Attorneys for Appellee.

JUNE 1941.

APPENDIX

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APPENDIX

[1] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

HABEAS CORPUS, No. 2092

IN THE MATTER OF JAMES CURTIS

Petition for a writ of habeas corpus

The petition for a writ of habeas corpus filed by James Curtis respectfully shows to the Court the following:

1. That he is a citizen of the United States, a resident of the City of Baltimore, State of Maryland, and is at the present time unlawfully confined in the District Jail of the District of Columbia.

2. He was indicted in the District Court of the United States for the District of Columbia on March 18, 1937, for the crime of robbery; was convicted on March 22, 1938, and on April 19, 1939, was sentenced to serve a term of from two years and two months to five years.

Petitioner having been advised by counsel believes and accordingly avers that his detention is illegal and contravenes the Sixth Amendment of the Constitution of the United States for the following reasons:

(a) That he was not confronted with the witnesses against him—Nathan Reiskin, proprietor of the drug store alleged to have been robbed, who reported the robbery; Vincent Curley, a clerk in said store “robbed of a black billfold containing \$2,” according to the police “incidental,” who has signed an affidavit after more than three years that to the best of his recollection the petitioner James Curtis is not the man who committed the robbery in question; Blanche Greene, 1810 Rosedale St. NE., and George F. Greene—although they were each named as “witnesses” in the police report and were

known and available to the police then as they are known and available to attorney for petitioner now.

2 Petitioner therefore respectfully urges that the police deliberately withheld from testifying those persons personally present at the alleged robbery, named and recorded by the police themselves in their own police "incidental" as "witnesses" because they well knew—then as now—that those persons could not and would not identify the petitioner as having participated in the alleged robbery of a drug store at 87 Florida Avenue NW., on the night of January 6, 1937.

Petitioner on this point further respectfully submits that the refusal of the Honorable Justice to permit introduction of police report substantially effected his trial, for otherwise the disparity between the description in the police "incidental" with that of the petitioner then on trial would alone necessarily create a reasonable doubt.

(b) Denial of the right to have compulsory process for obtaining witnesses in his favor.

Petitioner avers that, although at his request subpoenas were issued to five witnesses who would have testified, if called, that petitioner was in another city at the time of the alleged robbery, none of such subpoenas was ever served, although each of said witnesses was at his proper place of residence or employment as specified in defendant's application for subpoenas and available for service.

Wherefore Petitioner prays that a writ of habeas corpus issue directed to Thomas M. Rives, Superintendent of the Washington Jail and Asylum commanding him to produce the body of your petitioner before this Court on a day and at an hour named in said writ and show cause if any he has why your petitioner should not be discharged from his illegal custody.

(Signed) JAMES CURTIS.

James Curtis.

Subscribed and sworn to before me this — day of July 1940.

[SEAL]

(Signed) RICHARD H. WOODWARD,

Notary Public, D. C.

Let this petition be filed without the prepayment of costs.

(Signed) JAS. W. MORRIS, *Justice.*

Transcript of Testimony at Hearing on Petition for Habeas Corpus

15 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

HABEAS CORPUS No. 2092

IN THE MATTER OF JAMES CURTIS

WASHINGTON, D. C., *Friday, November 29, 1940.*

The above-entitled cause came on for hearing before Associate Justice James W. Morris, in Criminal Division No. 2, at 3: 30 o'clock p. m.

* * * * *

43

VINCENT J. CURLEY

was called as a witness on behalf of the defendant [Curtis] and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MULLEN:

Q. Your full name is Vincent J. Curley?

A. Yes.

Q. You were employed, were you not, at 87 Florida Avenue on the night of January 6, 1937?

A. I was.

Q. In that store?

A. Yes.

Q. And sometime that night there was a hold-up in that store?

A. That is right.

Q. How many men were engaged in the hold-up?

A. Two.

Q. What was their relative height?

A. One was tall and one was short.

Mr. MULLEN (addressing the defendant). Will you stand up?

(The defendant stood as requested.)

By Mr. MULLEN:

Q. You would say he is a tall man, would you not?

A. Yes; I would.

Mr. MULLEN (addressing the defendant) Sit down, please.
(The defendant resumed his seat.)

By Mr. MULLEN:

Q. I understood that a gun was placed in your side.
44 Didn't you so tell me?

A. Yes—it was pointed at me.

Q. It was not placed in your side? I am in error, am I?

A. I can't remember now.

Q. This was last June. I am not asking you to remember January 6, 1937, but in June of this year didn't you tell me that the gun was placed in your side?

A. I believe it eventually was.

Q. Didn't you also tell me that you would never forget the man who placed that gun in your side, that if you saw him you would know him?

A. That is my belief, but not having this experience I cannot say. But that is my belief.

Q. But, if you please, didn't you also tell me that no matter where you might see the man that held you up, you would recognize him?

A. That is the way I feel.

Q. Will you come down here, please, and will you stand up, Mr. Curtis?

(The witness left the stand and stood before the defendant.)

Is that the man who held you up?

A. I have seen this gentleman before, over in Baltimore.

Q. That is not the question I asked you.

A. I don't believe so.

Q. You know he is not the man; upon your oath you know he is not——

Mr. JACKSON. I object to the argumentative character of the question.
45

The COURT. Come on back to the stand.

(The witness resumed the stand.)

Mr. JACKSON. You are putting words into the mouth of the witness.

The COURT. Ask the questions, Mr. Mullen, and do not argue with the witness.

By Mr. MULLEN:

Q. When you went to Baltimore, you were brought there by Detective Thompson, were you not?

A. I believe that is his name.

Q. He sits right here [indicating].

A. That is right.

Q. And you were brought to a so-called line-up, were you not?

A. Yes.

Q. And before you were brought to that line-up were you not shown a picture of Jimmy Curtis, who sits here [indicating]?

A. I was.

Q. And then you went into the line-up?

A. That is right.

Q. And you saw the men in the line-up, didn't you?

A. Yes.

Q. And you knew that Curtis was not the man that held you up? You knew then that he was not the man, didn't you?

A. I don't remember whether I definitely stated he was not, but I don't believe he was.

Q. Didn't you tell Detective Thompson, after he had shown you the picture of Curtis and you came out, "Well, yes; 46 this picture you showed me is the picture of the man in there, but that is not the picture of the man who held me up." Didn't you say that?

A. I said that I recognized the man in the line-up, Curtis, from the picture I had been shown, but not from the crime.

Mr. MULLEN. Your witness.

CROSS-EXAMINATION

By Mr. JACKSON:

Q. After the robbery that night were you not in the store for some few moments later?

A. Yes; I was in the store for probably two and a half hours.

Q. Did not the officers come right promptly after the report had been made?

A. Yes; they did.

Q. And, of course, they took your name and address?

A. That is right.

Q. And was it upon that occasion that either Mr. Tolson or Mr. Thompson—perhaps one of the officers, anyway—had a group of pictures and showed them to you and the other employees there? Or do you remember that?

A. Yes; I do remember being shown pictures.

Q. They showed you a group of pictures at the time; is not that correct?

A. Yes.

Q. And among those pictures didn't you or some one of the other people there employed—Boyer or Abrams or yourself or some or all of you—say in effect, "This particular
47 picture looks like the taller man?"

A. I can't answer for anyone else.

Q. Were you present when one picture was picked out as probably being the man?

A. Yes; I was present and that was suggested as being, perhaps, the hold-up man, or one of the hold-up men.

Q. It was among this group of pictures, was it?

A. Yes.

Q. And the one that was suggested turned out later to be Curtis' picture?

A. That is right.

Q. Approximately on July 9—I don't expect you to remember the date, but you might—you signed a statement relating to your best knowledge in this case; is not that correct?

A. I remember it very distinctly.

Q. You might take a look at that and see if that is the statement, please sir [handing a paper to the witness].

The COURT. July 9, when?

Mr. JACKSON. 1940, your Honor.

The WITNESS. Do you want me to read all of it?

By Mr. JACKSON:

Q. Just enough to satisfy yourself so that you can say that is your statement. I just want to know if you recognize it as your statement.

A. Yes; that is my statement.

Q. And on the back of the second page—is that your signature there [indicating]?

A. Yes.

48 Q. With respect to the identification of Mr. Curtis here, didn't you say this—and I will read you the last paragraph of your statement that you have just identified—

Several weeks later I visited the Baltimore jail, at which time I viewed a line-up of four or five men. At that time a man, later identified to me as James Curtis, was in the line-up. At that time when I viewed the line-up I felt as though the man I later learned was James Curtis, who was in the line-up, was not the taller of the two men who engaged in the hold-up at 87 Florida Avenue, referred to above.

I cannot say positively whether he was or was not the taller of the two men. Deep down in my heart I do not believe that it was the man, and I did not believe it at the time, but I had to allow myself a certain leeway for my own weaknesses, as far as remembering is concerned, in my excitement, and therefore I did not want to be positive either way. I feel now that if I saw the taller of the two men that engaged in the robbery that I would recognize him; but until such time as I would see that man and positively put myself at ease that he was the hold-up man I would not say positively that the one known to me as James Curtis was not the man.

Is that your statement?

A. Yes, sir.

Q. And that is your statement now?

A. Yes, sir.

Q. In other words, you cannot swear whether Curtis is or is not the man?

A. No; because I am not in the habit of making a
49 definite assertion unless I am positive of it.

* * * * *

52 RECROSS-EXAMINATION

* * * * *

52 By the COURT:

Q. Did you testify in the trial of this defendant?

A. No, your Honor.

Q. Were you called or summoned to testify?

A. I was not.

Mr. MULLEN. Thank you for your Honor's question, which reminds me of another one.

REDIRECT-EXAMINATION

By Mr. MULLEN:

Q. Since 1937 you have been continuously in the District of Columbia?

A. Yes.

Q. And your name has been in the 'phone book, has it not?

A. Yes.

Mr. MULLEN. Thank you, sir.

By the COURT:

Q. Did you talk at the time of the trial with counsel for the Government or for the defendant?

A. At the time of the trial?

Q. Or before the trial.

A. No. After that trip to Baltimore I heard nothing further from the case.

Q. Until when?

A. Until I met Mr. Mullen.

Q. And that was about when?

A. That was last summer.

Mr. MULLEN. In June of this year, if your Honor please.

The WITNESS. I had just given it up as something I did not expect to hear about.

RECROSS EXAMINATION

By Mr. JACKSON:

Q. You told the officers, after you had been in the line-up, that you could not be positive whether he was or was not the man, that you did not think so?

A. I had the same feeling then as I have now.

Q. Just as you corroborated by the affidavit that I read to you?

A. Yes.

Q. And you so advised them? Is not that correct? You told them so?

A. Yes.

* * * * *

Thereupon—

GEORGE FREDERICK GREEN

54 was called as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

* * * * *

Q. What is your full name?

A. George Frederick Green.

55 Q. You never talked with me in your life? You don't know me, do you?

A. No, sir.

Q. Do you know this gentleman here? You have talked with him several times—Mr. Jackson?

A. Yes, sir.

Q. And you came down here unattended; nobody came with you at all?

A. No, sir.

Q. You came by yourself?

A. Yes, sir.

Q. You live at 52 Quincy Place Northwest?

A. Yes.

Q. And in 1937 you lived there?

A. Yes, sir.

Q. Do you remember when the store was robbed in January, about three and a half years ago?

A. Yes, sir.

Q. You remember that well, don't you?

A. Yes.

Q. Were you held up?

A. So far, they didn't get nothing from me, but I heard them say it was a hold-up, and get back in the corner there; that is all.

* * * * *

56 Q. What were you doing that night when it was robbed?

A. I went in there to read the Bulletin.

Q. Were you reading the Bulletin when the robbers came in, when the hold-up men came in?

A. Yes, sir.

Q. Did they hold you up?

A. No. I heard them say it was a hold-up, and go back in the corner. They didn't get nothing from me.

Q. But you were there when the officers arrived?

The COURT. He said he was there. Let us get on to what happened.

By Mr. MULLEN:

Q. You were there when the officers arrived, too, were you not?

A. Yes, sir.

Q. The store is well lighted, is it?

A. Yes.

Q. Good lighting?

A. Yes.

Q. There is nothing wrong with your eyes, is there?

A. No, sir.

Q. Did you see the men that robbed the store? You saw them, didn't you?

57 A. No, sir; I couldn't get a good look at them.

Q. They were in there quite a while, were they not?

A. They told me to get back there in the corner, and then they went out after that. The officers came after they went out.

Q. The officers came after they went out?

A. Yes.

Q. And you told the officers what you had seen?

A. Yes.

Q. And they took your name?

A. Yes.

Q. And your address?

A. Yes.

Q. But you were not at the trial? This is the first time you have appeared in connection with this? You have never testified before?

A. No, sir.

Q. Would you know either of those men if you saw them?

A. No, sir.

Q. Were they white or colored men?

A. White.

Q. Were they tall or short men?

A. One was a tall man, but I couldn't see him good. He had a gun down on the side and said, "This is a hold-up. Get in the corner," or something like that.

Q. Your memory is pretty good, is it not?

A. Yes.

Q. How about the other man? Was he a tall or short man, the second man?

58 A. I didn't see him, the second man.

Q. You did see the tall man, though, didn't you?

A. Yes, sir.

Q. Do you think you would recognize the tall man if you saw him?

A. No, sir; I don't think I would.

Q. You don't think you could?

A. No, sir.

Q. If you thought back do you think it would help you as to whether or not you would recognize him if you saw him?

A. No.

Q. Don't you kind of pride yourself on your memory?

A. I didn't get to see him good.

Mr. MULLEN. I guess there is no use pursuing this any further, your Honor.

* * * * *

58 Thereupon—

BLANCHE P. GREENE

was called as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MULLEN:

Q. Your name is Blanche P. Greene and you live at 1810 Rosedale Street Northeast?

A. Yes.

* * * * *

59 Q. You were an eyewitness to a robbery that occurred on the night of January 6, 1937, at 87 Florida Avenue Northwest?

A. Yes, sir.

Q. You were personally present, were you?

A. Yes.

Q. Were you ever called as a witness in any trial after that night?

A. No, sir.

Q. And you have been in the city continuously; is that correct?

A. Yes.

Q. You live out there with your mother?

A. Yes, sir.

Q. How old are you, by the way?

A. How old am I?

Q. Yes.

A. Twenty-six.

Q. Was there any old lady in the store that night?

A. There was.

Q. There was one old lady?

A. That is right.

Q. What were you doing there? Do you recall with any degree of distinctness what you were particularly doing when the robbers entered the store that night?

A. They were there when I got there.

Q. What were they doing?

A. I don't know just what they were doing.

60 Q. Did you see them in the process of committing the hold-up? Did they have guns on them?

A. I walked into the drug store. When I walked over, a short man——

The COURT. Speak a little louder.

The WITNESS. There was a short man when I walked in the drugstore, and he put a gun in my side and told me to go to the back of the store.

By Mr. MULLEN:

Q. There was another man, was there not?

A. I didn't see him.

Q. You did not see a tall man?

A. No, sir.

* * * * *

60 Q. Did you see the short man go out of the store? Did you remain until the short man, who had the gun, left the store?

A. I stayed there until the officers arrived.

Q. You then saw the short man leave the store, did you not?

A. I didn't see him leave the store. I had my back to the door.

Q. You turned your back on him because he had a gun?

61 A. No; I didn't do that. He had the gun in my side; he was beside me.

Q. You did not see any other man?

A. No, sir.

Q. Do you recall my showing you a photograph?

A. Yes, sir.

Q. And you said you could recognize those men?

A. I said I could not.

Q. Didn't you say there were two there?

A. I told you, one man.

Q. Didn't you say a tall man and a short man?

A. I didn't tell you that.

Q. Come down here, please.

(The witness left the stand and stood near the defendant.)

Of course you realize why you are here, I take it——

The COURT. Go ahead and ask the witness the questions.

By Mr. MULLEN.

Q. Will you look at this man carefully (indicating the defendant)? Have you ever seen that man before?

A. No, sir.

Q. You are sure you did not see him in that drug store?

A. I saw one man. I didn't see one his height. The one I saw was about my height.

* * * * *

61 Mr. MULLEN. I have no other witnesses, your Honor.

62 Those are the three witnesses who did not testify and who were available. One lived at 1810 Rosedale on January 6, 1937, and still resides there and has lived there continuously. The other lives at 52 Quincy Place and lived there on January 6, 1937, and still lives there. I have no other witnesses. I think the record speaks for itself.

* * * * *

62

JESSE G. ABRAMS

was called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

63 Q. And on that evening [January 6, 1937] were you present when the store was held up?

A. I was.

Q. Before I go any further, was Mr. Reiskin there during that period—the owner of the store—while it was held up, or immediately after?

A. No; he was not.

Q. He was not there immediately before it was held up, was he?

A. No, sir.

Q. Did there come a time when you identified a man who had participated as one of the hold-up men in that case?

A. Yes.

Q. And whom did you identify?

A. I identified that man right there [indicating].

Q. Who is that man?

A. Mr. Curtis.

Q. Do you identify him today as being one of the two men?

A. I do.

Q. Are you absolutely positive that he was the man?

A. I am.

Q. And you have so testified a number of times; is
64 that correct?

A. I did.

Q. Have you always been absolutely positive that he was one of the men?

A. Yes; I have.

* * * * *

75

JAMES J. LAUGHLIN

was called as a witness on behalf of the United States and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. JACKSON:

Q. You are Mr. James J. Laughlin, member of the bar of the District of Columbia?

A. Yes.

Q. And upon the so-called second trial of Mr. Curtis here, on approximately January 18 or 19, I believe, in 1938—

A. 1939, Mr. Jackson. It will be two years this January.

Q. (Continuing)—you represented him, did you not?

A. I did.

Q. And as a part of your work you had occasion to
76 summons and to interview the witnesses that you got at government expense from Baltimore, did you not?

A. I did.

Q. And are you able to say, either from memory or from refreshing your recollection from these papers here [indicating], who those people were that you talked to and what the net result was after you had interviewed them?

A. I can say this, that—suppose I explain a little history of the case, if that is in order.

Q. All right.

I would like the record to show that he is not speaking from notes or anything, and that he did not look at the papers I handed to him.

A. Mr. Curtis sent for me in the summer of 1938, I would say, the month of July or August—he was then in the District Jail—and asked me if I would represent him. I found out that Mr. O'Connell had represented him at the first trial, and I communicated with Mr. O'Connell and asked him if he had any objection if I came into the case. He said, none whatever. I talked with him and I arranged for the trial. It is quite vivid in my memory because the order summoning witnesses for the defense at the expense of the United States was the first order signed by Judge Laws when he came on the bench. That was the first order he signed.

77 Mr. Curtis told me that there would be certain witnesses in Baltimore who could prove that he was somewhere else on the night in question.

I think there were four or five in number. One I think was Dr. O'Brien, and there was a Miss Archer. I think there were one or two others—also a taxi driver.

I prepared a summons in accordance with the D. C. Code whereby the defendant has that right, to certify to the Court under oath that for lack of funds and to bring these witnesses here at its own expense.

That affidavit was filed. Mr. Jackson interposed no objection. Judge Laws signed the order, and the witnesses were summoned, and we had planned for a trial in September. We set a date.

* * * * *

78 There were two or three continuances during the fall. None of the continuances were requested by the Govern-

ment. They were requested by myself or Mr. Curtis because at that time I was engaged in the South on one or two cases, and then, of course, preparing this research for Judge Laws took quite some time.

We finally arranged for trial in December. Witnesses on both sides were present, and on that morning Curtis said he did not want to go to trial, that he wanted a continuance. Mr. Jackson pointed out to Judge Laws that these witnesses were here. Judge Laws granted the continuance.

The case came on for trial in December. Those witnesses who had been subpoenaed from Baltimore at my request were here.

I talked to them and they told me that their testimony would be very unfavorable to Curtis, and then, acting on what
79 I thought was best for my client, I told them to go back to Baltimore because I was afraid, maybe, if they stayed here the Government would use them and they would be unfavorable to the defendant.

They thereafter left. When they left it was at my request because I thought I was acting in the best interests of the defendant.

Thereafter the trial went on, and there were a number of points that came up in the trial. I can say the police incidental was subpoenaed by me. Further, before the trial came on I conferred many times with Curtis and we agreed on what witnesses would be helpful to me, and every witness called to my attention that I thought would be helpful was summoned by me.

I prepared the case with a great deal of care, and I thought I had it in excellent shape. I do not say that boastingly, but I think I had the case in good shape.

The case went on. The police incidental was here. Whether it was actually received in evidence, I don't know. If it was received in evidence at my request I did it because I thought it was helpful to the defendant. If I objected I thought the contents of that incidental would not be in the best interests of the defendant.

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79 * * * I don't think any defendant in any criminal court in the United States ever got such a fair and painstaking trial as Curtis got at the hands of Judge Laws.

80 * * * * *
 Furthermore, I insisted and I asked repeatedly that the defendant take the stand and submit himself to examination.

He protested vigorously and said that he did not under any circumstances want to take the stand.

Furthermore, we were confronted with this serious difficulty, which made our task before the jury so difficult, that Curtis was guilty of flight, and he was brought back, having jumped bond. That is admissible in criminal law.

81 * * * * *
 After the conviction, your Honor, there was a motion for a new trial filed by me, and I think a copy of it was served on the United States Attorney.

I argued that, and it was overruled and denied. Curtis was sentenced.

At that time Curtis and I came to the parting of the ways. I don't know what caused it. He wrote me a letter and said he no longer wanted my services.

I do not have such a letter in my files but I do recall telling Judge Laws that I had done everything I could, and if Curtis wanted to go further and note an appeal, I would do so, and he said, "If he does not want you further in the case, that is all right, and if it is necessary," he would appoint an attorney to prosecute an appeal in the Court of Appeals if Curtis wanted one.

By Mr. JACKSON:

Q. With reference to the police incidental referred to, I show you a piece of paper and ask you if that seems to be an accurate copy of the thing you summoned [handing a paper to the witness].

A. Yes.

Q. Did you read it at the time?

A. That is it.

82 Q. That is it?

A. Yes.

Q. Did it have those addresses and names at the bottom of it that were in the police incidental book?

A. Yes.

Q. This is the incidental or the copy that you were interested in?

A. Yes.

Q. You had that at the trial?

A. Yes.

Q. The incidental was subpoenaed?

A. Yes.

Q. For the defendant?

A. Yes.

* * * * *

83 (Copy of police incidental was marked United States Exhibit 1, received in evidence, and is as follows:)

Police Incidental

HOLD-UP AND GRAND LARCENY

Nathan Reiskin, Prop. of Drug Store 87 Fla. Ave. NW., reports about 7:50 today 2 W. men # 1, 28 to 30 years, 5 ft. 10 in., 160 to 175 lbs., sharp features, dark, gray overcoat, light-brown hat, small moustache, mixed red scarf held a nickel-plated revolver; # 2 is 30 to 35 years, 5 ft. 4 in., 150 lbs., stout build, dark-gray overcoat, dark hat, dark complexion, held a dark revolver with a pearl handle, held up above drug store and took about \$80.00 from cash register.

Jesse Abrams, 1913 Eye St. NW., phone Me. 8312, a clerk in above store was robbed of a black billfold containing \$10.00 in bills and .50 in change, permit & registration card and a Waltham wrist watch, Val. 15.00.

Vincent Curley, 54 M St. NW., Apt. # 205 also a clerk in above store was robbed of a black billfold containing \$2.00.

84 *James Bowyer*, 30 O St. NW., a customer in above store was robbed at \$1.00.

Witnesses—*Blanche Greene*, 1810 Rosedale St. NE.

George F. Green, 52 Quincy Pl. NW.

J. F. Ehlman & T. C. Lewis (Made Reiskin).

* * * * *

84 Q. [By Court.] Before he [Mr. Mullen] inquires, I would like to know this: I notice that this police incidental, which was referred to, contains the names of certain persons, including Mr. Curley.

Mr. JACKSON. He is on there; yes, sir.

The COURT. And also the names of Blanche Greene and George Green.

By the COURT [of the witness Laughlin].

Q. Was there any effort made by the defense to secure the attendance of those witnesses?

A. Well, your Honor, Blanche Greene, if I am correct—

85 There was a Mrs. Greene in Baltimore, I think was her name. I would say I can't answer your Honor specifically. That is almost two years ago. I would testify I knew of those names. I talked them over with Curtis.

If I did not summon them it was because I did not think it would be helpful to Curtis.

By Mr. JACKSON:

Q. Isn't it true, Mr. Laughlin, that their absence was commented upon adversely in the argument to the jury?

A. Yes. I did refresh my recollection of what I said in the argument to the jury and I did comment on it.

Q. Advantage of it was taken by the defendant that these people listed as Government witnesses were not there?

A. Yes; and there is quite a bit of space devoted to it in the argument.

By the COURT:

Q. You mean the argument made to the jury that because they were not produced by the Government that they could infer that their testimony would be unfavorable to the Government's contention?

A. Yes.

CROSS-EXAMINATION

* * * * *

88 A. Yes. She [Curtis' girl friend in Baltimore] was over here one time, I think, and she said, "If you will

arrange to come to Baltimore, we will interview one or two or three of these witnesses."

I went to Baltimore on a certain afternoon and told here to meet me in the Federal Building, and we went to see three or four witnesses.

I recall specifically we talked to one. I was far from satisfied with what he told me, but after—the other two for some reason were out of the city or they were not talked to by me on that occasion.

Q. Didn't she give you the names and addresses of five persons, five witnesses that you said you were going to summon at the expense of the Government: Chris, Archer, Johnnie, Dr. O'Brien?

A. Dr. O'Brien's name is familiar. Miss Archer?
Mr. JACKSON. Ruth Archer.

By Mr. MULLEN:

Q. Do you know her?

A. The name, yes, sir.

Q. Also Marian?

A. Marian Green? This is his sister. She said under no circumstances would she come.

Q. Dr. O'Brien you saw likewise?

A. He came and he said, "If you put me on I will murder him," or some such expression.

Q. Do you recall when that was? Do you recall when he told you if you called him he would murder him?

89 A. That was in this courtroom—in the hall. He told me he could not say he saw Curtis on this night.

Q. Didn't you on the 20th of December 1938, file an affidavit in forma pauperis for the summoning of certain witnesses?

A. We filed one in September. I think that same affidavit carried over. We filed one in September, and we may have renewed that later.

* * * * *

92 Thereupon

JAMES BOWYER

was called as a witness for and on behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

92 Q. Directing your attention to January 6, 1937, were you at some drugstore with Mr. Abrams, at Reiskin's, 87 Florida Avenue?

A. Yes.

Q. You were there when a hold-up occurred?

A. Yes.

Q. Did there come a time when you identified any
93 one of the men who participated in the hold-up?

A. Yes.

Q. Was money actually taken from you by that man?

A. The other fellow.

Q. Did that particular man you identified threaten you with a gun at any time or hold a gun on you?

A. Yes.

Q. Who is that man?

A. The defendant sitting there [indicating]?

Q. The one you know as James Curtis?

A. Yes.

Q. Are you absolutely positive that he was one of the two men that threatened you with a gun that night?

A. Yes.

Q. Was the drugstore well lighted?

A. It was well lighted.

Q. Both inside, in the windows, and under the showcases?

A. Yes.

Q. Have you always been positive of your identification of Curtis?

A. I have.

Q. I will ask you, Are you positive now?

A. Yes.

Q. Were you positive that night after this happened when some police officers or officer brought some pictures, which was right after the incident occurred?

A. Yes.

Q. And they asked you to look at the pictures and see if you recognized among those pictures anyone that looked like

94 any one of the men?

A. Yes.

Q. Did you at that time select any picture that looked like some one or more of the men?

A. I did.

Q. Among those pictures that you saw at that time, immediately after the hold-up occurred, whose picture did you pick out?

A. I picked out James Curtis's picture, but I did not know the name at the time I picked out his picture.

At the time there were several or more pictures they laid on the counter.

Q. They showed you several pictures?

A. Yes.

* * * * *

EXHIBIT No. 2 (Tr. 86)

Transcript of Proceedings at Criminal Trial No. 59347

2 * IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

CRIMINAL No. 59347—ROBBERY

UNITED STATES v. JAMES CURTIS

WASHINGTON, D. C., *Tuesday, January 17, 1939.*

The above-entitled cause came on for trial before Associate Justice Bolitha J. Laws and a jury, in Criminal Division No. 3, at 10:20 o'clock a. m.

* * * * *

3 JESSE G. ABRAMS was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

* * * * *

Q. What is your full name?

A. Jesse G. Abrams.

* NOTE.—Page references are to the particular pages in the exhibit.

Q. Where are you employed?

A. 87 Florida Avenue, Northwest.

Q. What is the nature of your employment?

A. I am a pharmacist in charge of a store.

* * * *

Q. Who is the owner of the store?

A. Nathan Reiskin.

Q. Is he your employer?

A. He is.

Q. You were so engaged, then, during the month of January, 1937, were you not?

A. I was.

Q. Do you know the defendant, James Curtis, in this case, when you see him?

A. I do.

4 Q. Will you tell us whether you see him here today; if you do, where he is?

A. Right there.

Q. At the end of the table?

A. Yes.

Q. Now, directing your attention to January 6, 1937, were you on duty in the drugstore?

A. I was.

Q. And at that time did you have occasion to see this defendant, James Curtis?

A. I did.

Q. About what time of the evening was that, if you remember?

A. It was about 7:30.

Q. Around 7:30?

A. Yes.

Q. Tell us what you saw this defendant doing and what you heard him say, and what happened at that time.

A. Well, the evening in question I was on duty in the drugstore at 87 Florida Avenue; I was standing behind—

By the COURT:

Q. Is that Florida Avenue, Northeast or Northwest?

A. Northwest.

Q. In Washington, D. C.?

A. That is right. And I was behind the liquor counter; I looked up and I saw this man at the end of the counter and he was putting his foot over the counter, and he had a gun in his hand.

At the time there was a clerk in the store with me and
5 the clerk put his hands up. The defendant told him to put his hands down, and he made myself and the clerk go toward the rear of the store.

In the meantime I noticed there was another man came in with him, who went behind the counter from the other side of the store, and this Mr. Curtis made us stay in the back of the store and he made us face toward the wall, and while he did that he went through my pockets and extracted my purse and some change that I had; then he went through the pockets of the clerk. After that he made me come out from the rear of the store and go down behind the liquor counter again and open up the cash register for him.

In the meantime he told me not to try any funny stuff. I told him to go ahead and take it.

So, I opened the cash register for him and he took all the money, bills and change, that was in the register, and made me march back again in front of him to the rear of the store again.

A couple of other customers had come in, in the meantime, and the other party that was with him made them go into the rear of the store.

After he had taken me back to the rear of the store again, the other party that was with him left the store, and he just stood there—I was standing right next to him, and I took a very good look at him, and I stayed there right next to him.

There was a telephone there, and while I was out in the front of the store with him the other party that was with him had pulled the wire that connected the telephone, pulled
the wire directly away from it. While he was stand-
6 ing there with me he went to see if the wire was connected to the telephone, too.

Q. When you say "he" you are speaking of this defendant, Curtis?

A. Yes; Curtis went to see if the wire was connected to the telephone also.

After that he made us all turn around and face to the wall again and he told us not to move for five minutes. After that he left the store.

Immediately after he left the store I called the police and they came down within three or four minutes.

Q. How much money of yours did he get?

A. Well, he got—I had \$10 in bills and some change.

* * * *

Q. How much money did he get out of that cash register you say he made you open?

A. I don't remember the exact amount, but it was between ninety and one hundred dollars.

Q. Whose money was that?

A. That money belonged to Nathan Reiskin, the owner of the store.

Q. This clerk who was there with you, was that man named Curley?

A. Yes.

Q. Do you know where Curley is now?

A. I don't know where Curley is now; he only
7 worked there a very short time.

* * * *

Q. How good were the lights in there while this was going on?

A. Well, the store is very well lighted; we have four big 150-watt lights enclosed in large circular globes; there is also a light in the rear of the store but that wasn't on at the time, but the lights in the store reflect very well into the rear of the store.

Q. Now, when you say "rear" you mean some sort
8 of prescription department or something like that?

A. Well, yes; the prescription department.

Q. Is that what you mean when you say "rear"? It is a sort of little alcove in the back of the main room?

A. Well, the store is triangular in shape and what I am talking about, the prescription department is just a small place toward the rear of the triangle.

Q. And the counters are also flooded with light, isn't that correct, to show the counters inside the store?

A. Yes; they are.

Q. Which add to the light?

A. Yes, sir.

Q. Did Mr. Curtis have any mask or anything on his face when he came in?

A. There was no cover on his face at all.

Q. Were you able to get a good look at him during the time?

A. I got a very good look at him.

Q. Approximately how long was he in there, would you say?

A. He was in the store for about four or five minutes.

Q. Are you positive that Mr. Curtis here is the man that held you up and did the things you said?

A. I am positive that he is the man.

* * * * *

CROSS EXAMINATION

* * * * *

33 Q. Do you recall a conversation with an officer in Baltimore named Feehley?

A. No; I don't.

Q. Do you recall having a conversation with some police officers in the City Jail in Baltimore in January 1937?

A. No.

Q. Tell us, then, did there come a time when you went to the Baltimore City Jail?

A. Yes.

34 Mr. JACKSON. Wait a minute. When are you talking about?

Mr. LAUGHLIN. I asked him, Did there come a time? Now, I am going to let him answer.

* * * * *

36 The time is in January 1937, the same month?

A. It was the end of January.

Q. In the Baltimore City Jail?

A. That is right.

Q. You had a certain conversation with police officers in Baltimore; is that right?

Mr. JACKSON. About this case?

The WITNESS. I don't remember definitely any conversation with any police officers in Baltimore. The only thing——

By Mr. LAUGHLIN:

Q. (Interposing). You went to the Baltimore City Jail in January 1937?

A. That is right.

Q. For what purpose did you go there?

A. To see if I could identify anyone connected with the robbery.

Q. At whose suggestion did you go?

A. Why, Detective Sergeant Thompson told me they had a man who they believed robbed the store.

* * * * *

37 Q. You drove to Baltimore?

A. Yes.

Q. When you got to Baltimore you went to the City Jail?

A. That is right.

Q. Were there any Baltimore officers there at the time when you got to the jail?

A. I believe there was another officer.

Q. I mean, of course, in connection with this case and not in connection with anything else.

A. First we went down to the police headquarters, down there where Detective Sergeant Thompson was supposed to meet a Baltimore police officer to go over to the Baltimore City Jail. He met this officer and this officer—I don't

38 know what his name is—but this officer went over to the Baltimore City Jail with us. Well, they were sitting up in front of the car. I don't know what they were saying. I was in the rear of the car. When we went into the Baltimore City Jail they told us to wait in the room and then they took me to a very large room in which they had several men lined up, and I picked Curtis from this line-up, as the man who had committed the robbery.

Q. Had anything been said to you by any of the officers before you did that?

A. Not just prior; not that I know.

Q. How many men were in line with Curtis?

A. Oh, there were about between six and eight men.

By the COURT:

Q. Had it been some time prior to that that you had identified a photograph of him?

A. No; I never, at any time, identified any photograph of him.

Q. You never did?

A. No; they did show me a photograph of him and I said it looks like the man, but I would not say positive unless I saw him in person.

By Mr. LAUGHLIN:

Q. Did you ever tell the police that you identified anyone else?

A. What was that question?

Q. Did you ever tell the police that you identified anyone else as committing this robbery at any time?

A. No.

39 Q. When it came to identify Mr. Curtis in Baltimore, you say there were several men lined up; is that correct?

A. That is right.

Q. Will you just tell us about how many there were?

A. Six, eight, or ten.

Mr. JACKSON. He said six or eight.

The WITNESS. Six or eight.

By Mr. LAUGHLIN:

Q. Who else was present, which officers were present when you picked out Mr. Curtis?

A. The officers, as far as I remember, the officers were in the other room. It was only the members of the Baltimore police force that were in this large room.

Q. Does the room have a screen around it?

A. Well, it does not have a screen around it but it had a row of bars all the way across from one end to the other.

Q. Do you know where Mr. Tolson and Mr. Thompson were? Could they see these men that were lined up?

A. As soon as you walked into the room to your left was a sort of cubicle and it was divided into two parts, and one side the business, and the other side for whoever called to

see them or talk to them. As soon as we walked in to your left and to your right was this row of iron bars stretched from one end of the room to the other. In front of that row the men were lined up.

Q. Before you picked out Mr. Curtis do you recall whether you had talked to any of these officers about Mr. Curtis?

A. No.

Q. Did anyone say to you what position in the line was a man named Curtis?

40 A. No, no.

41 * * * *

JAMES BOWYER was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

42 Q. Do you know the defendant, James Curtis, in this case, when you see him?

A. I do.

Q. Do you see him here today?

A. I do.

Q. Will you indicate where he is?

A. Right there.

Q. At the end of the table?

A. Right there at the end of the table.

Q. Directing your attention to January 6, 1937, did you have occasion to see Jesse Abrams at his drugstore?

A. I did.

Q. About what time of the evening was that, if you remember?

A. It was between the hours of seven and eight.

Q. Did anything unusual happen at that time?

A. It did.

Q. Tell us what happened, what you did and what you saw happen.

43 A. Between the hours of seven and eight I entered the drugstore at First and Florida Avenue; it is a drugstore and liquor store combined. After entering the drug-

store and liquor store combined, I completely shut the door behind me, and after shutting the door behind me, why, a short, stout, stocky built white man stepped out, from where I do not know, with a revolver, and stuck it in my right side, and said, "This is a stick-up," and I then glanced him in the face and I threw my hands up.

He said, "Put your hands down. Come on, get around there." And in jerking me by my right arm, I had two half-dollars, silver dollars, in my right coat pocket, and they jingled, and this little, short, stout man put his hand down in my coat pocket and took that away from me; then commanded me to get behind the counter at the point of the revolver. He then commanded me to get behind the counter, which I did at the point of the revolver, pushing me behind in the prescription department.

I then saw the defendant, James Curtis, standing right at this door, which is a swing door between the business and prescription department, I then saw James Curtis standing there with a revolver. This short man turned me over to Mr. Curtis. He then directed me to get around there, which is a little alcove like in the prescription department.

Well, I stood there, and the light of the drug store, it was well lighted enough to identify anyone.

And after him holding me there for about three or four minutes the other short, stout bandit who was operating in the front part of the store at the time, he then came and pushed the door to and said, "All right," to the defendant.

44 James Curtis then put on his gloves, the little, short, stout bandit held the revolver on us, James Curtis put on his gloves; then after he put on his gloves he disconnected the telephone which was in the prescription department, and then he said, "All right, stand still until we get out," and after that——

By the COURT:

Q. (Interposing). Who said that?

A. James Curtis, the defendant.

He said, "Stand still until we get out," which we stood still until after they got out.

The Police Department was notified and it wasn't two or three minutes before they responded to this scene.

By Mr. JACKSON:

Q. Did you get a good look at the defendant, James Curtis?

A. I did.

Q. How long were you able to get a look at him?

A. About three or four minutes.

Q. Was the light good or bad?

A. It was well lighted, the store was well lighted.

Q. Are you absolutely positive that this defendant is the man whom you referred to in your statement as James Curtis?

A. I am, positively.

* * * * *

45

CROSS-EXAMINATION

* * * * *

53

Q. Now, did there come a time in January of that year, January 1937, that same month, that you went to Baltimore?

* * * * *

A. I did.

Q. With whom did you go?

A. I went to Baltimore with Detective Thompson, Detective Tolson, and another doctor, which I forget his name.

Mr. JACKSON. That is all right. He has nothing to do with this.

The WITNESS. Well, I went there with him.

By Mr. LAUGHLIN:

Q. And you went to the Baltimore jail, is that correct?

A. I don't know whether it was the jail or what it was, but I know it was a place where I saw the defendant.

Q. Now, when you saw him were there other men present?

A. When I saw him?

Q. Yes.

A. Who are you referring to?

The COURT. Mr. Curtis.

By Mr. LAUGHLIN:

Q. When you saw Mr. Curtis, here.

54 A. When I saw him, yes; he was in the line-up. There wasn't any official or anything there at that time in the line-up.

Q. When was the first time the name "Curtis" had ever been mentioned to you?

A. Well, the first time the name "Curtis" had been mentioned to me was after I had picked him out of the line-up.

Q. That was in Baltimore?

A. That was in Baltimore.

Q. The name "Curtis" had never been mentioned to you before?

A. No; I never heard it.

* * * * *

125 EVIDENCE ON BEHALF OF THE DEFENDANT

Thereupon—

J. J. TOLSON, a witness previously called and sworn, was recalled on behalf of the defendant and testified further as follows:

Mr. JACKSON. Mr. Tolson [a Metropolitan Police Department detective] is now a witness for the defendant. Is that right?

126 Mr. LAUGHLIN. He has already been sworn.

Mr. JACKSON. And you are making him your witness?

Mr. LAUGHLIN. That is right.

* * * * *

By Mr. LAUGHLIN:

Q. You are here now as a defense witness and in response to a subpoena duces tecum addressed to the Major and Superintendent of Police; is not that right?

A. Yes, sir.

Q. Have you produced certain records? I ask you first if you have produced a record of the lookout or the police incidental?

A. The police incidental is here. A uniformed officer at No. 2 has that, and Lieutenant Cox is here with data in regard to the other information you requested.

Q. Is this [indicating] Lieutenant Cox?

A. Yes.

Mr. LAUGHLIN. I think he possibly should be excused until he is called, your Honor.

The COURT. Yes.

127 Mr. JACKSON. I will concede that that book is whatever you say it is.

By Mr. LAUGHLIN:

Q. Will you take that book and turn, please, to the back where a report of this alleged robbery is entered?

A. Yes. Here it is, right here, starting right here [indicating].

Mr. LAUGHLIN. Your Honor, for the purpose of identification I have a book titled Volume 82-B North from 12/36 to 2/20/37, and I want to offer in evidence, your Honor, an entry contained in that book. It has been conceded by the Assistant United States Attorney that it is one of the official records of the Police Department.

Mr. JACKSON. Do you offer it at this time?

Mr. LAUGHLIN. Yes.

Mr. JACKSON. I object, your Honor, and will be glad to state why, either here or at the bench.

The COURT. Let me see it, first.

(Volume referred to was handed to the court.)

On what theory do you think this is admissible?

Mr. LAUGHLIN. The theory on which it is admissible is this. I want to show that there is some variance in the description mentioned in that. It was apparently given——

The COURT. You mean, the description of the men?

Mr. LAUGHLIN. Yes.

The COURT. This is given by Reiskin, though. I sustain the objection.

Mr. LAUGHLIN. I note an exception, your Honor.

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160 ARGUMENT TO THE JURY ON BEHALF OF THE DEFENDANT

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163 Then again you have also the statement from Abrams and the other man, that there was a man named Curley, and one of them said he is now with the Government. If he is now with the Government it would take the Police Department about 15 minutes to locate him, just about 15 minutes, and why isn't he produced here?

His Honor will charge you, and it is the law, that if there is a witness who might be available and could throw light on this transaction and he is not in court, you are warranted and justified in taking into consideration the fact that his testimony might be unfavorable. Of course there was no duty on our part. We did not know there was such a man as Curley, but there was a duty on the part of the Government, a duty on the part of the Police Department to produce this man, to bring him in to the United States Attorney's office,
164 and have him available here as a witness. Was that done?

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